No. 49592-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TYLER MORRY WALLACE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief/Response to Appellate Counsel's Motion to Withdraw

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I. ISSUE

A. Has appellate counsel correctly determined there are no non-frivolous issues on appeal?

II. STATEMENT OF THE CASE

The State accepts the statement of the case presented in counsel's brief, as supplemented in the argument below.

III. ARGUMENT

A. APPELLATE COUNSEL HAS CORRECTLY DETERMINED THERE ARE NO NON-FRIVOLOUS ISSUES ON APPEAL.

Counsel has identified as potential appellate issues (1) insufficiency of the evidence to convict Wallace of Assault in the Second Degree, (2) trial court error in admitting Facebook messages during testimony about prior inconsistent statements, and (3) ineffective assistance of counsel in failing to object on Fifth Amendment grounds to testimony regarding Wallace leading Officer Humphrey to the knife. Counsel correctly notes each of these claims lack merit.

When a court-appointed attorney files a motion to withdraw on the ground there is no basis for a good faith argument on review, pursuant to *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970) and *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct.

1396 (1967), the motion to withdraw must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Theobald*, at 185, *quoting Anders*, at 744. The indigent defendant should be given a copy of this brief and allowed time to raise any issues of his choosing. *Id.* The court then decides whether the case is "wholly frivolous" after a full examination of the proceedings. *Id.*

Counsel has complied with this procedure. The State concurs with counsel's assessment of the issues, as discussed below. Further, Wallace has not filed a *pro se* brief. This Court should therefore grant counsel's motion to withdraw and affirm Wallace's conviction.

1. The State Presented Sufficient Evidence For A Rational Jury To Find Wallace Guilty Of Assault In The Second Degree.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397

U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Wallace of Assault in the Second Degree the State was required to prove, beyond a reasonable doubt, that on or about April 7, 2016, Wallace intentionally assaulted Kimberly Nolan with a deadly weapon. RCW 9A.36.021(1)(c); CP 23. The State was required to prove Wallace acted with the intent to create apprehension and fear of bodily injury and Kimberly Nolan did in fact feel reasonable apprehension and imminent fear. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (citations omitted); CP 24.

The State presented evidence that on April 7, 2016, during an argument between Wallace and Kimberly Nolan, Wallace walked up to Nolan and slapped her in the face with an open hand. RP 34-36. After Nolan said she was going to call the police, Wallace went into the kitchen, grabbed a knife, and told Nolan he was going to kill her. RP 39-40. Wallace held the knife at his side, pointed at Nolan, and walked toward Nolan. RP 40-41. Nolan testified that when Wallace had the knife pointed at her, Nolan was fearful Wallace would hurt her or her children. RP 47.

From this evidence, a reasonable jury could find Wallace used a deadly weapon with the intent to cause Nolan to fear imminent bodily injury. A reasonable jury could find Nolan in fact felt fear and this fear of injury was reasonable in light of the previous slap, the

statement Wallace made about killing Nolan, and the actions Wallace took after obtaining a knife. Any argument regarding contradictory testimony, whether some people could find Nolan's response to the assault unusual, or whether Wallace's witnesses could have created reasonable doubt would not be properly viewing the evidence in the light most favorable to the State and drawing reasonable inferences in the State's favor. The jury was in the best position to determine witness credibility and evaluate conflicting evidence, and the jury found there was proof beyond a reasonable doubt to convict Wallace. The evidence presented was sufficient to support this determination.

In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Wallace committed Assault in the Second Degree, and this Court should affirm his conviction.

2. The Trial Court Did Not Abuse Its Discretion When It Admitted Facebook Messages During Testimony About Prior Inconsistent Statements.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). The interpretation of an evidentiary rule is reviewed de novo. *State v. De Vincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

It is an abuse of discretion when the trial court bases its decision on untenable grounds or the decision is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted). This Court may uphold the trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds. *See State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

Authentication or identification is a condition precedent to the admissibility of exhibits. ER 901(a). This is satisfied by evidence "sufficient to support a finding that the matter in question is what its proponent claims." *Id.* A witness with knowledge can testify "that a matter is what it is claimed to be," and such evidence will conform with the requirements of the rule. ER 901(b)(1).

When a subject or line of inquiry is opened up by a party during direct or cross examination, the party "contemplates that the rules will permit cross-examination or redirect examination, as the

case may be, within the scope of the examination in which the subject matter was first introduced." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (citations omitted). "The trial court has considerable discretion in administering this open-door rule." *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), aff'd, 154 Wn.2d 477, 479, 114 P.3d 637 (2005). Additionally, when a witness's credibility is attacked by the opposing party, corroborating evidence is admissible to rehabilitate the credibility of the witness. *State v. Froehlich*, 96 Wn.2d 301, 305, 635 P.2d 127 (1981) (citations omitted).

Here, during Wallace's case in chief, Nolan testified she had no phone conversation with Tiffani Cummings on the day of the incident and only communicated with Cummings through Facebook messages. RP 89. Nolan stated she did not tell Cummings that Wallace never pulled a knife during the incident. RP 89. Nolan also stated she never told Cummings that Nolan was planning to get money as a result of being a "battered woman." RP 90.

Cummings, who is Wallace's sister, then offered testimony that Nolan did make these statements in a phone conversation. RP 92-94. This testimony was offered as extrinsic evidence of prior

inconsistent statements by Nolan to be considered for the sole purpose of evaluating Nolan's credibility. RP 93.

On cross examination, Cummings testified there were actually two phone calls with Nolan on that day in between the Facebook messages – one at 4:00 p.m. before Nolan called the police and one at 7:00 p.m. after. RP 94-97. Cummings testified Nolan said in the first call a knife had been involved, but in the second call, Nolan said there had not been a knife and she did not tell the police there was a knife. RP 95, 97. Cummings testified there were no additional Facebook messages after the 7:00 p.m. phone call. RP 99.

The State then showed Cummings a series of Facebook messages between Nolan and Cummings. RP 99-100. Cummings testified she recognized the messages as the Facebook conversation Cummings had with Nolan on the day of the incident. RP 99-100. The State cross examined Cummings about incongruities between her testimony and the Facebook messages, regarding both the timing and content of the messages and the alleged phone calls. RP 100-103. The State offered the Facebook messages as evidence. RP 101.The trial court admitted the messages as Exhibit 3, overruling Wallace's objection the messages were extrinsic evidence. RP 101-102.

The trial court did not abuse its discretion in admitting the Facebook messages. The testimony of Cummings identifying the messages provided sufficient evidence to authenticate the exhibit. Additionally, when Nolan and Cummings were questioned about alleged statements Nolan made to Cummings on the day of the incident, Wallace opened the door for the State to pursue that line of inquiry and cross examine Cummings about her communication with Nolan on that day regarding the incident. The trial court has considerable discretion in administering this rule and did not abuse its discretion here. *See Ang v. Martin*, at 562.

The trial court did not abuse its discretion when it admitted Exhibit 3. There was no error and this Court should affirm Wallace's conviction.

3. Wallace Received Effective Assistance From His Trial Attorney Throughout His Case.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

To prevail on an ineffective assistance of counsel claim Wallace must show that (1) the attorney's performance was deficient

and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130. Whether or not the tactic was successful "is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011).

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Prior to custodial interrogation, as a procedural safeguard to "secure the privilege against self-incrimination," officers are required to inform defendants of certain rights, such as the right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). When an officer's questioning induces a suspect to reveal the location of evidence, such an act may be considered a self-incriminating statement and should be suppressed if the act was done while in custody and without proper *Miranda* warnings. *State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797 (1988).

When a defendant's statement is to be offered in evidence, there must be a hearing to determine whether the statement is admissible. CrR 3.5. The purpose of the hearing is to have a process for admitting voluntary incriminating statements in a way that prevents the jury from hearing involuntary statements. *State v. Williams*, 137 Wn.2d 746, 750, 975 P.2d 963 (1999) (citations omitted). This hearing may be waived by defense counsel. *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983).

Here, defense counsel waived a CrR 3.5 hearing, stating Wallace's statement was voluntarily given after receiving *Miranda* warnings. RP 6-7. Defense counsel did not object at trial when Officer Humphrey testified Wallace showed her the location of the knife after she asked. RP 78. Although Officer Humphrey's testimony did not mention *Miranda* warnings, defense counsel's statements at the pretrial hearing make it clear this was not an issue. Defense counsel was not deficient for waiving a CrR 3.5 hearing because Wallace received *Miranda* warnings prior to his voluntarily showing Officer Humphrey the location of the knife.

The record also reflects defense counsel may have been hoping the State would offer statements Wallace made to Officer Humphrey which would be considered inadmissible hearsay were Wallace to attempt to introduce them himself. Defense counsel asked Officer Humphrey if Wallace gave a statement and whether he was cooperative. RP 79. Officer Humphrey testified Wallace was cooperative in giving a statement but she did not elaborate. RP 79. When discussing jury instructions, defense counsel noted Officer Humphrey did not testify to what Wallace said to her, and the State responded it was not going to present Wallace's case for him. RP 121. This implies the statements Wallace made to Officer Humphrey,

if believed, would be helpful to the Wallace. Therefore, defense counsel's stipulation to voluntariness and admissibility could also be considered a legitimate trial tactic to get those statements in front of the jury. That this tactic was ultimately unsuccessful does not render defense counsel's performance deficient.

Defense counsel was not deficient in waiving a CrR 3.5 hearing because Wallace showed Humphrey the location of the knife after receiving *Miranda* warnings. Additionally, defense counsel's decision to stipulate to the voluntariness and admissibility of Wallace's statements was a legitimate trial tactic. There is no legitimate claim of ineffective assistance of counsel, and this Court should affirm Wallace's conviction.

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IV. CONCLUSION

For the foregoing reasons, Wallace's conviction and sentence should be affirmed, and counsel should be permitted to withdraw.

RESPECTFULLY submitted this 16th day of June, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
JESSICA L. BLYE, WSBA 43759
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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Respondent's Brief/Response to Appellate Counsel's Motion to Withdraw

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